

REMARKS

Claims 1-6 were pending in the Application. Applicants cancelled claims 1 and 5-6 without prejudice or disclaimer. Hence, claims 2-4 are pending in the Application. Applicants cancelled claims 1 and 5-6 only to expedite the issuance of claims 2-4 and not in response to the Examiner's cited art. Applicants are not conceding in this application that cancelled claims 1 and 5-6 are not patentable over the art cited by the Examiner, as the present claim amendments and cancellations are only for facilitating the expeditious prosecution of the subject matter (claims 2-4) indicated by the Examiner as being allowable (see below). Applicants respectfully reserve the right to pursue these (claims 1 and 5-6) and other claims in one or more continuation patent applications.

Claim 4 was amended to be rewritten in independent form. Claims 2 and 3 were amended to be dependent upon claim 4 instead of cancelled claim 1. Hence, claims 2 and 3 were amended to be commensurate with the cancellation of claim 1.

Thus, no prosecution history estoppel arises from the amendments to claims 2-4. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 62 U.S.P.Q.2d 1705, 1711-12 (2002); 56 U.S.P.Q.2d 1865, 1870 (Fed. Cir. 2000). Further, the amendments made to claims 2-4 were not made for a substantial reason related to patentability and therefore no prosecution history estoppel arises from such amendments. See *Festo Corp.*, 62 U.S.P.Q.2d 1705 at 1707 (2002); *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 41 U.S.P.Q.2d 1865, 1873 (1997).

Applicants thank Examiner Williams for discussing the rejection of claim 4 on June 10, 2008 with Applicants' attorney, Bobby Voigt. Examiner Williams agreed to allow claims 2-4, with the present claim amendments, as discussed herein, provided that the Examiner does not find new relevant art in a subsequent search.

As was discussed with Examiner Williams on June 10, 2008, the rejection under 35 U.S.C. §103(a) in connection with pending claim 4 is overcome based on, at least in part, in the arguments presented herein.

Applicants respectfully assert that Lumelsky et al. (U.S. Patent No. 6,463,454) (hereinafter "Lumelsky") and Gales (U.S. Patent Application Publication No. 2003/0084323) (hereinafter "Gales"), taken singly or in combination, do not teach "wherein the plurality of earlier monitoring periods all begin at the same times on consecutive days previous to the present monitoring period" as recited in claim 4.

The Examiner cites paragraph [0022], lines 11-16 of Gales as teaching the above-cited claim limitation. Office Action (4/8/2008), page 5. Applicants respectfully traverse.

Gales instead teaches that the activity profile data 54 may be updated on a substantially continuous or ongoing basis or may be updated in accordance with predefined time periods. [0022]. Gales further teaches that for example, the activity profile data 54 may be updated on a daily, weekly, monthly or other predefined time period schedule. [0022].

Hence, Gales teaches updating the activity profile data 54 on either a daily, weekly, monthly or other predefined time period schedule.

There is no language in the cited passage that teaches that the plurality of earlier monitoring periods all begin at the same times. Neither is there any language in the cited passage that teaches the plurality of earlier monitoring periods all begin at the same times on consecutive days. Neither is there any language in the cited passage that teaches the plurality of earlier monitoring periods all begin at the same times on consecutive days previous to the present monitoring period.

Therefore, the Examiner has not presented a *prima facie* case of obviousness in rejecting claim 4, since the Examiner is relying upon incorrect, factual predicates in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Claims 2 and 3 recite the combinations of features of independent claim 4, and hence claims 2 and 3 are patentable over Lumelsky in view of Gales and in further view of O'Reilly et al. (U.S. Patent No. 6,853,950) for at least the above-stated reasons that claim 4 is patentable over Lumelsky in view of Gales.

As a result of the foregoing, it is asserted by Applicants that claims 2-4 in the Application are in condition for allowance, and Applicants respectfully request an allowance of such claims. Applicants respectfully request that the Examiner call Applicants' attorney at the below listed number if the Examiner believes that such a discussion would be helpful in resolving any remaining issues.

Respectfully submitted,

WINSTEAD P.C.

Attorneys for Applicants

By: 

Robert A. Voigt, Jr.  
Reg. No. 47,159

P.O. Box 50784  
Dallas, TX 75201  
(512) 370-2832

Austin\_1 535847v.1